Supreme Court of the United States

October Term, 1960

No. [illegible]

ANTHONY ASTORE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[illegible]
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Petitioner Anthony Astore prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on March 27, 1961.

OPINION BELOW

The opinion of the Court of Appeals in the case has not yet been reported. This opinion is set forth as Appendix (I) hereto. The opinion of the District Court in the case has not yet been reported. This opinion is set forth as Appendix (II) hereto.

JURISDICTION

The Judgment of the Court of Appeals was entered on March 27, 1961. The jurisdiction of this court is invoked under Title 28 United States Code, Section 1254 (1).

QUESTIONS PRESENTED

The questions presented in this case are as follows:

(1) Was there proof of knowledge under Section 1465, Title 18, U.S.C.

(2) Was there proof of aiding or abetting under Section 2, Title 18, U.S.C.

STATUTE INVOLVED

The Statute involved in this case is Title 18 U. S. Code, Section 1465. Insofar as it applies here, reads as follows:—

> "Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000. or imprisoned not more than five years, or both."

Section 2, Title 18, United States Code, reads as follows:

> "(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States is punishable as a principal."

STATEMENT OF THE CASE

The Indictment

The indictment contains one count as follows:—

"On or about the 20th day of January, 1959, in the Southern District of New York, Sam Gold, Anthony Astore, Moses Shipman and Joseph Schwartz, the defendants herein, did unlawfully, wilfully and knowingly transport and cause to be transported in interstate commerce, from Lodi, New Jersey, to New York City, New York, for the purpose of sale and distribution, obscene, lewd, lascivious and filthy films."

The Record

The record in this case is the original typewritten record and exhibits of the district court. The printed appendix of approximately 168 pages was submitted to the Court of Appeals by the appellant and a Certified copy of this appendix has been filed with this Court for this case, as has the original typewritten record and exhibits of the district court.

The Facts

The Petitioner herein went to trial in this case with another defendant whose conviction was revised on appeal. Two of the defendants on the indictment, Moses Shipman

and Sam Gold, pleaded "Guilty". Both of them were called as witnesses on behalf of the Government.

Insofar as the Petitioner Anthony Astore is concerned, the only testimony affecting him, was given by Samuel Gold, Agent Foster, Moses Shipman and the defendant himself, who took the stand in his own defense.

Samuel Gold testified as follows (22a)*: He stated he was a half owner in the Bergen Film Laboratory and that it was his business up to a day before the trial, when he signed over his half to the Petitioner Anthony Astore. That he first started in the film business about 1954 or 55 (22a) and that at the time he was associated with a man by the name of Thomas Broderick of West New York, New Jersey, where he processed various types of films and also sold obscene films. In 1957 he sold his share to Mr. Broderick and did some free lance trouble shooting in New Jersey (23a).

Some time in 1958 he went over to see Broderick who brought up the proposition of buying the Bergen Film Laboratory in Lodi, New Jersey and at this time he went over to see the Petitioner, Tony Astore, whom he knew for a few years (24a).

He asked the Petitioner, Anthony Astore whether it would be alright for him to operate in Lodi, to make stag films and if possible to get protection. He was told he could. At that time Tony asked him if he could get part of the business and he agreed to talk it over at some future time. A few days later he had another conversation with Tony (26a). At that conversation he said it would be agreeable to take Tony in as a third partner. Arrange-

* Numbers refer to the pages of the defendant-appellant's Appendix.

ments were made about the payment of certain moneys (27a).

At the time this arrangement was made, they had in addition to Educational and Religious films and Cartoons, about twelve rolls of Stag films that were brought over from the old firm. These films were stored in the premises of Bergen Film Laboratory. This all took place somewhere around July 1958 and he testified that until January 1959 they had lots more negatives.

He testified that he had many transactions with the other defendant Shipman, involving the sale of obscene films (29a).

After he entered this three way partnership with Broderick, the Petitioner Anthony Astore and himself, they started to make stag films and he made a contact with Shipman for the purpose of purchasing some of these films.

In 1958, when he first bought into the Bergen Film Laboratory he received a phone call from Shipman and stated that at this time he told Astore "this fellow Moe, he's from New York, wants to buy something" (30a).

He emphasized the fact that when he spoke to Astore about Shipman he told him that he was from New York and that this was where the market was (31a).

He further stated that anything that was sold, was split fifty-fity with Astore. (This was after Broderick supposedly bought out.)

In the latter part of October, 1958, he had a transaction with Shipman, wherein he wanted to purchase thirty or forty rolls of films (32a). Arrangements were made for this sale, but Shipman did not show up.

A few days later he received a call from Shipman wherein he said he did not show up because he was being followed (33a).

He had several conversations with Astore regarding the fact that Shipman did not come in for more films. Finally on January 20, 1959, another transaction took place. On that morning Shipman called and said he needed thirty-five pieces of film, but that he did not have the money to pay for them. He wanted Gold to meet him in New York. Gold told him that he would have to come to New Jersey to pick it up (34a).

He finally did meet him in New Jersey. He testified about a conversation he had after that telephone call wherein he told Astore that Shipman wanted Gold to bring the films to New York but did not even have the money to pay for it. Astore was supposed to have O.K.'d the credit (35a).

He met Shipman a few hours later, after he and Astore packaged the film, which was delivered to Shipman (35a).

He further testified that at one time, on a parking lot, Tony Astore came along and he introduced him to Moe Shipman with the following language, "This is Moe. He's from New York and he's the guy who buys the stuff", (37a).

On cross-examination he testified that after he was arrested and indicted in this case, he went to the F.B.I. agent for the purpose of helping himself and that he was looking for leniency.

The witness testified that he had been previously convicted for opening up an envelope in the Post Office and received a sentence of one year.

During the the six years that he was in business he sold about eight or nine thousand obscene reels (40a).

He admitted that at one time he himself photographed the scene depicted on these obscene films. He took these photographs in New Jersey and at one time went to Cuba for that purpose (41a).

When he went to Cuba he took expenses and even cheated his partner (42a).

These films in New Jersey were taken in a Motel on Route 46, New Jersey (42a).

Not only did he take these pictures of men and women in various states of undress, but made up the masters and produced the films from the masters and he alone had the experience to take these pictures (43a).

Aside from Shipman there was only one other person in New York that he sold pictures to, whose name he could not remember (44a). He was asked once again about the words used when Shipman was introduced to Astore and this time he stated the following: "Tony, this is Moe from New York". This introduction by the way, took place in October 1958, not at the time when the films in this indictment were sold (45a). When he was again asked for the exact wording he repeated, "This is Moe from New York."

He further testified that he made a statement to Agent Foster of the F.B.I. (46a).

At about the time he made a statement to Agent Foster, a woman whom he knew was being questioned by the F.B.I. At this time he denied the fact that he was living with this woman (47a). Her name was Marian Sparato and she worked at the Bergen Film Laboratory. Prior to that time

she worked at the Novelty Film with the witness. He took her out socially (48a) but denied he ever slept with her.

He accompanied her to the United States Attorney's Office when she was questioned. He stated he did not want her involved because of a personal matter and that he was very fond of her. He was afraid his wife may find out abont her (49a).

He was asked if Astore's son had an interest in the business and he denied that. He denied that he transferred the stock to Astore's son (50a). He claimed he had a 50% interest in the business (51a).

He testified that on the original statement to Agent Foster he told Agent Foster that Astore had nothing to do with the situation as far as the lewd films were concerned and when asked if that was a lie, he said that was not the complete truth. This statement was made a few months after the witness's arrest in January, 1960 (53a).

In a statement of May 24, 1960, he told Agent Foster that he was the only one responsible for the sale of these obscene films and signed a statement to that effect (54a).

He testified that at that time, May 24th, he did not implicate Tony.

At about this time when some questions were asked about the May 24th statement, the United States Attorney said there were two statements, although only one was handed to counsel for defense (56a).

After counsel obtained the other statement, the witness testified that he made two statements to Agent Foster. It then appeared that there was a statement made in March

1960. This was the statement previously referred to by the witness as the May statement (58a).

On the statement in March, he completely exonerated the defendant Astore (58a) and two months later he made another statement in which he implicated him (58a).

He testified that he knew Bob Astore, the defendant's son; that he came to work every day; that he was about twenty-three years of age, but denied that the original stock was taken in the name of Bob Astore (62a).

He said that Tony Astore told him that he wanted to break his son into the business, so that he could make a nice living making films (63a).

The statements of the witness Sam Gold were offered in evidence. One was dated March 25, 1960 and the other May 23, 1960.

It was agreed between counsel (77a) that the date Marian Sparato appeared before the Federal Grand Jury, was on March 23rd. The witness testified that at the time she appeared on March 23rd, he had as yet not made any statements to the F.B.I. (77a) and on that day he knew she was told that she would have to come back (80a). Two days after that he made a statement to the F.B.I. admitting his own guilt.

It was during this time that he made a second statement implicating Astore (81a). He further testified that the night in between his first appearance on the stand and his second appearance on the stand, he slept at the home of Marian Sparato. That he slept there many times; that during vacation he stayed at her place for a time; that she

was divorced (82a). That he knows her children and that her children call him Papa (83a).

On redirect he stated that he never saw any of the documents relating to the stock ownership (90a) and that he received $3,000.00 for his share from Tony (93a).

He was shown exhibits concerning the sale of stock in the office of Mr. Alino of New Jersey and he said he signed those papers without reading them (94a). This was done at a time he knew he was going to testify in court against Astore (95a).

Mr. Foster the F.B.I. Agent was then called to the stand and he testified to certain conversations with Mr. Astore, in which he told him that Mr. Gold had been identified as having delivered obscene films to Shipman. He told Mr. Astore that he was primarily concerned with obtaining the negatives at which time Mr. Astore turned to Mr. Gold and said to him "get them" (100a).

Mr. Shipman was called as a witness by the Government and testified that he never was introduced to Mr. Astore and that the first time he ever met him in his life was in the courtroom, after the arrest in this case (102a).

Mr. Alino the attorney was called as a witness and he testified concerning the sale of the stock. He testified that Mr. Gold read all the papers he signed and that Mr. Gold sold the stock to Bob Astore and not to Tony Astore (109a).

The Petitioner Astore took the stand and testified that he was (48) years of age, married, had one son age 24. That prior to his interest in the Bergen Film Laboratories, his son graduated from the University of Miami (110a). He the Petitioner was a Veteran, honorably discharged and

received a 60% disability from the United States Government. Prior to his association with the Bergen Film Laboratories he was a stamp collector and still did that kind of work (111a). Prior to Bergen Film Laboratories he knew nothing about the making or producing of films. He knew Sam Gold for about years and knew he was in the business of selling obscene films. He stated that when he purchased his interest in the Bergen Film Laboratories he bought the 50% interest that Mr. Broderick had and that prior to that time he did not have a one-third interest (115a).

The purpose of buying the business was for getting some business for his son, who just graduated from college (114a).

That throughout the time he was in that business he never took any salary and never knew anything about obscene films being sold in that place.

A few days before the trial the son bought the interest of Sam Gold for $1,000.00, not $3,000.00 as stated by the witness Gold (116a).

He stated that the first time he ever met Shipman was when Sam Gold was being arraigned in court and never met him before (117a).

He had nothing to do with the sale of the film to Mr. Shipman and did not know he was coming over to buy films. He further stated that he never even signed checks on behalf of Bergen Film Laboratories (117a).

When he spoke to Mr. Foster he was told Sam Gold was arrested for selling obscene films to Mr. Shipman and that when Mr. Foster came in he tried in every way to cooperate with him and told Sam Gold to get the films (119a). That he made such arrangement with Mr. Foster.

On redirect, he testified that when Agent Foster came in on January 20th, he knew nothing at all about the arrest and he told Agent Foster that he was at liberty to search the place at that particular moment (135a).

Reason for Granting the Writ

An inspection of Section 1465, Title 18, U.S.C., sets forth that one of the elements of the crime charged, is the question of knowledge. It follows from this that a mere sale and distribution of the forbidden film is not a violation of the U. S. Code.

In addition to the sale and distribution, there must be some proof to show that there was knowledge by the defendant that these films, as set forth in the indictment, were to be transported between states.

The cases hold that there must be some sort of awareness of the substance of the crime, which by the language of the statute states "knowingly transporting in interstate commerce". *U. S.* v. *Crimmins*, C.C.A. N.Y. 1941, 123 F. 2d 271.

With this ruling in mind, let us examine the facts in this case. How did the Government go about to prove under this indictment that this defendant knowingly transported the films in question in interstate commerce? Once again by virtue of the charge in the indictment, the only incident that could be proved is the alleged transportation on January 20, 1959.

The Government proceeded to prove this knowledge with but one witness, Samuel Gold, who was indicted in this case originally without the Petitioner Astore and by a

superseding indictment the Petitioner Astore's name was added as a party defendant. Gold pleaded "Guilty" to the indictment and then took the stand against the Petitioner Astore.

In testifying on behalf of the Government, Gold testified to an incident in 1958, wherein he used the following words in a conversation with Astore. "Well, this fellow, Moe, he's from New York, wants to buy something" (30a).

It must be stated here, that Gold had many transactions with Shipman before he entered any business with the Petitioner Astore (29a). Later upon being questioned about this conversation, he used the following language. "Well, I said he was from New York, and whatever he bought on there, why, that's where his market was, was in New York" (31a).

Obviously this testimony was given for the purpose of showing that the Petitioner was aware of the fact that the customer was going to distribute the films in New York. Being an accomplice his testimony should be very carefully scrutinized. It seems strange that in each instance, when he was asked to repeat actual words, he varied the language. On cross examination when he was asked to repeat the exact words used in connection with an alleged introduction of Shipman to Astore, he stated: "Tony, this is Moe from New York" (45a), and when asked to give the exact words again, his answer was "This is Moe from New York. He handles obscene—handles stag film" (46a). This introduction took place in 1958.

At another time, in talking about this introduction, the defendant used these words: "This is Moe. He's from New York, and he's the guy who buys the stuff" (37a).

It might be well to note at this time, that this so-called introduction was absolutely denied by Shipman, who also pleaded "Guilty" and was called as a Government witness (102a). At this point in the trial, Shipman who had pleaded "Guilty" and who knew he could possibly get hurt by giving testimony which would aid the Petitioner, nevertheless gave testimony which absolutely contradicted the testimony of Gold. Gold on the other hand testified with the knowledge that he could be helped on his sentence by giving the required testimony. This introduction and conversation was denied by the Petitioner when he took the stand (117a). The witness Gold knew that in order to get a conviction against Astore, there must be some proof of transportation in interstate commerce (46a).

It follows therefore, that the testimony offered to show that the Petitioner Astore knew that films were to be transported in interstate commerce, was offered only through the witness Gold and concerned incidents which were disputed by another witness called by the Government.

In finding the Petitioner guilty, the court acknowledged that there was a legal problem, when it made the following remarks (138a):

> "The real problem with reference to the case of Astore is a legal one, and that legal one is this: Can a seller of obscene films be an aider and abettor to the buyer who subsequently transports them in interstate commerce? Can the participation as seller make that seller an aider and abettor for the federal offense of interstate transportation of obscene films? To this Court, that is a serious legal question. The opinion which the Government cites by Judge Learned Hand in Peoni would seem to indicate other

wise, would seem to indicate that a seller in such circumstances cannot be an aider and abettor to a subsequent transportation."

Let us examine the question of aiding and abetting as it applies to this case. In the case at bar, there was no proof offered that the Petitioner had any connection with the activities of Shipman, in transporting these films to New York. Let us assume again that Gold's testimony is to be believed. The basis of the violation is not the selling of obscene films but their transportation between states and the ultimate profit of such sale between states. This case comes clearly within the doctrine set forth in the case of *U. S.* v. *Peoni*, C.C.A. N.Y., 1938, 100 F. 2d 401.

An interpretation of Title 18, U. S. Code, Section 2 would clearly indicate that in order to tie in the defendant with the crime, there must be proof that he had aided or abetted in the commission of the crime of transporting in interstate commerce the films in question, to wit, the sale of January 20, 1959.

The testimony of Gold clearly shows that when he received the call on January 20, 1959 from Shipman who wanted Gold to meet him in New York, he had already told Gold to come over to New Jersey for the purpose of buying these films, before he had any conversation with the Petitioner, assuming of course that his testimony regarding that conversation is to be believed.

In other words, the negotiations were completed and Shipman was told to come over and make the purchase long before he had this "mythical" conversation with the Petitioner. There could be no aiding or abetting by the Petitioner of a crime which was committed by Shipman, the per-

son who did the actual transporting, and the conclusion reach by the Court in its findings (137a) that the Petitioner knew of the sale and subsequent transportation of the obscene films is not based upon the evidence, since the evidence clearly showed that Gold had many dealings with Shipman and told him to come over for the purpose of purchasing these films.

In *U. S.* v. *Falcone*, C.C.A. N. Y. 1940, 109 F. 2d 579 affd. 311 U. S. 205, the Court held that the abettor must in some sense promote the venture himself; make it his own or have a stake in the outcome. In the case at bar, no such facts exist. Astore had no stake in the Federal crime, to wit: transporting in interestate commerce.

The same rule was followed in reversing a conviction of one who introduced a buyer to a seller. *U. S.* v. *Moses*, C.C.A. 3rd Cir. 1955, 220 F. 2d 166.

The term aiding and abetting means to assist the perpetrator of a crime. *U. S.* v. *Williams*, Fla. 1951, 71 S. Ct. 595, 341 U. S. 58. In the case at bar there was no evidence that the Petitioner assisted the perpetrator of this crime. As a matter of fact, if Shipman had been arrested before he left New Jersey, there would have been no Federal Offense committed whatsoever.

We must ask ourselves this question. "What act was done by the Petitioner that concerned the transportation between the states?" He did not speak to Shipman; he did not deliver to Shipman; he did not transport between the states. At best, if we believe some of Gold's testimony, it can only be stated that he knew what was being done, after all the arrangements had been completed. There must be a

community of unlawful purpose, when the act is committed. *Johnson* v. *U. S.*, C.C.A. 8 Cir. 1952, 195 F. 2d 673. In the case at bar, the act was committed when Shipman left New Jersey, to go to New York.

In evaluating the testimony of an accomplice, we must carefully scrutinize all the testimony to determine who he is and what his interests are. We must remember the general rule that testimony of an accomplice who testifies for the prosecution must be scrutinized with care and caution. *U. S.* v. *Falcone*, C.C.A. N.Y. 1940, 109 F. 2d 579 affd. 311 U. S. 205.

In light of that admonition let us look at the witness Gold. He testified that he sold some 8,000 or 9,000 obscene reels (40a). He photographed some of these pictures himself in New Jersey and went to Cuba for that purpose (41a). He testified that he produced the pictures and that he made up the masters by which these films were made in quantity (43a). He testified that he paid the girls and men who posed for taking these pictures (61a).

In this connection it might also be well to note the various inconsistency in the language used concerning knowledge as set forth herein. He was previously convicted for the crime of stealing mail and served a sentence therefor.

Now let us get to his motive. When he was arrested in January 1960, he absolutely denied to the F.B.I. agent that he had any implication in this crime. The first indictment, we must remember, did not contain the name of the Appellant Astore. Some time thereafter a woman named Marian Sparato was called before the Grand Jury to give certain testimony. He testified that this woman was a friend of

his and he took her out socially (48a). He also testified he did not want her involved (49a) because his wife might find out about it. He absolutely denied on cross examination that he had any sexual relations with this woman and yet when there was a recess and he came back to testify the next day, he admitted that he spent the night at her home and that her children called him Papa (83a).

The motive in implicating the Petitioner is very clear. There were two statements made by the witness Gold, admitted in evidence. Exhibit B, which was a statement of March 25, 1960 and Exhibit C, which was a statement of May 23, 1960. It was conceded that this so-called girl friend was called before the Grand Jury on March 23rd. This was two days before the first statement and she was told to come back before the Grand Jury (80a). Two days after this appearance, Gold, without the knowledge of his attorney went to the F.B.I. and made a statement admitting his own guilt. Two months after that he went to the F.B.I. again, made another statement, this time implicating Astore (58a) and his girl friend was excused from returning for further testimony (80a). The first statement he made, he said absolutely nothing about the Petitioner Astore (58a).

To summarize, when he was first arrested he denied his own guilt; two days after his girl friend appeared before the Grand Jury, he made a statement admitting his own guilt, but clearing everyone else. When he found that this did not help his girl friend, he made another statement implicating Astore. His statements have been as varied as his motives. When it suited him best to make one statement he fitted the facts to his purpose and then when it

suited him best to make a different statement, he again altered the facts to fit the situation. At that time and finally to prevent his girl friend from being further implicated, he made a statement implicating Astore. This girl friend by the way, worked with him from the time he was in partnership with one Broderick and worked with him each and every day in connection with his activities in the Bergen Film Laboratory.

The motive is very clear. He would say anything to avoid the embarrassment of bringing this girl friend into the picture. When counsel for the defense asked for these statements he was handed one statement and later it developed there were two such statements. Each contradicting the other (56a).

There is some further testimony concerning the habit of Gold fitting the facts to his purpose. His original testimony was that the Petitioner was a third partner with Broderick and himself (27a). This was refuted by Exhibit A, which showed that he was in a fifty-fifty partnership with Broderick and that the Petitioner Astore bought out Broderick's 50% interest and that at no time was Astore in partnership with Broderick.

He also denied that the Petitioner's son had any interest in this business (50a). He maintained that only a few days before his testimony on the stand, Gold sold his interest to the Petitioner for $3,000.00. Again documentary evidence (Exhibit D) showed that he sold his interest to the Petitioner's son for $1,000.00. When he was shown this exhibit, he had to get out of this in one way or another, so he stated that he signed the papers without reading them (94a). The attorney who handled this transaction was

called as a witness for the defense and stated he absolutely read everything to Gold before it was signed (109a).

Summarizing these various situations, it can be reasonably said, that his testimony was colored to fit the occasion and is not the kind of testimony upon which to base the conviction of an alleged accomplice.

CONCLUSION

It is respectfully submitted that this Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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April 20, 1961

APPENDIX I

Opinion of the United States District Court

The Court: This Court has listened to the evidence as it has been developed here, and there is no question in this Court's mind if this case were tried before a jury, the jury would likely convict the defendants. So the defendants' counsel were well advised to try the case before a court, because they felt confident that the Court would be required to weigh certain legal factors in assessing the evidence that the jury might overlook in a case of this kind.

Weighing those legal factors with reference to the evidence introduced as to the defendant Astore, we find no question but that Astore was a partner in an obscene film business. True, the business did religious films as well, but without question, the evidence shows that the Bergen Film Laboratory was also a laboratory for obscene films and that Astore knew it, and he participated in it, and he participated in the profits.

He said he put the profits back in the business, but at least he got some of the profits before he put them back, according to his own testimony.

Then, in addition to that, with reference to the defendant Astore, we have the testimony of an accomplice. Now, it is true that the testimony of an accomplice must be viewed with caution. It must also be corroborated. The testimony of this accomplice leaves no question, if it is to be believed, that Astore not only knew of the sale and subsequent transportation of the obscene films to the defendant Shipman, but actually approved the sale, knowing that it meant trans-

porting the films back to New York; he even approved it on a credit basis.

Now, if the testimony of Gold is to be accepted, there isn't any question but that those are the facts as this Court sees them, as to the guilt of Astore, and this Court accepts the basic testimony of the witness Gold, and this Court feels that his testimony is corroborated, being that of an accomplice, corroborated sufficiently by the proof of Astore's participation in the obscene film business and his acquiescence if not his cooperation in Gold's activities in that connection.

Further than that, when Mr. Astore took the witness stand, he was of no help to himself. This Court does not feel that his testimony was as candid and as frank in all particulars as it might have been. This Court is left with the very distinct impression that Mr. Astore knew much more about the Bergen Film Laboratory than he allowed on the witness stand, and that his activities in connection with the Bergen Film Laboratory were more than janitorial.

The real problem with reference to the case of Astore is a legal one, and that legal one is this: Can a seller of obscene films be an aider and abettor to the buyer who subsequently transports them in interstate commerce? Can the participation as seller make that seller an aider and abettor for the federal offense of interstate transportation of obscene films?

To this Court, that is a serious legal question. The opinion which the Government cites by Judge Learned Hand in Peoni would seem to indicate otherwise, would seem to indi-

cate that a seller in such circumstances cannot be an aider and abettor to a subsequent transportation.

However, Judge Hand in that case was not dealing with the immediate buyer. He was dealing with a buyer once removed, and on the basis of those facts, speaking for the Second Circuit, he upset the conviction of the defendant on the theory that he could not be an aider and abettor.

The cases from the Supreme Court are not particularly in point. Certainly no one of them is on all fours. However, the Ferrara case indicates that where persons set in motion a situation which they knew or should have known would result in interstate transportation, then they become responsible for that interstate transportation. That was the case of the confidence men who received a check from the lady whom one of them married and cashed the check and left the lady. The check was subsequently sent by the cashing bank to the drawee bank in another state, and the Court there held that that was the act of an aider and abettor, that the cashing of this check by these confidence men caused this stolen property to be transported in interstate commerce.

That case, I think, while not on all fours with the present case, certainly looks in this direction.

The Court is not familiar with the case which counsel for the Government just cited. If the substance which counsel said it stands for is correct, it would seem to be very close to being on all fours with the present case.

We move, then, to the defendant Schwartz.

Schwartz rode with Shipman, not only on the occasion of the indictment count but on other occasions. There isn't any question about that. The defense there is that he did not know; he was without knowledge of Shipman's activities in transporting these obscene films, and since he was without knowledge, he, of course, could not be guilty of the offense for which he is on trial.

Schwartz admitted that he knew that Shipman was in the obscene film business. He admitted to the agent that he himself had been in the obscene film business. Certainly, the packaging of obscene films is easily recognizable to an expert in the field, or at least the packaging of films which are in the possession of a known dealer in obscene films would give rise to some curiosity, to put it mildly, as to what was the contents of the package.

There are other circumstances which indicate that there was a purpose for Schwartz to be along on the interstate transportation in suit. The suggestion that he was a lookout, and the evidence on that certainly is circumstantial, but it is of a persuasive nature. The evidence shows that Shipman made one run into Jersey, became suspicious of being followed, or rather, at least turned around and came back; whether he became suspicious and came back is on an inference which can be taken either way depending on which side you are on. In any event, subsequently, Mr. Schwartz is along, and strangely enough, at the crucial moment of the interstate transportation, crossing, passing the border, he is actually observed wiping the rear window, and the suggestion there is, depending on which side you are on, that he was keeping the rear window clean so that

he could see if they were being followed, or he was wiping the mist from the glass so that their car would not be a traffic hazard.

It is true that the law has been and in some circuits apparently is that in a circumstantial case the circumstance must negative every reasonable hypothesis or inference, although in the Holland case the Supreme Court held specifically that failure to give such a charge to the jury was not error, but the test was still proof of guilt beyond a reasonable doubt.

But taking either test, it would seem that a case is made out against the defendant Schwartz. It is true it is a thin case, and I trust that Mr. Schwartz will take his case to the Court of Appeals and have the Court of Appeals weigh these facts, just like this Court is trying to weigh them. But it is a case which in this Court's judgment is made out beyond a reasonable doubt.

So it is this Court's judgment that the case as to both Astore and Schwartz is made out beyond a reasonable doubt, in spite of the fact that there is a serious factual question in the Schwartz case, a serious legal question in the Astore case, and consequently, for the reasons stated, this Court finds the defendants Astore and Schwartz guilty as charged on Count 1 of the indictment.

APPENDIX II

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 226—October Term 1960

(Argued February 7, 1961—Decided March 27, 1961.)

Docket No. 26491

UNITED STATES OF AMERICA

Appellee

—against—

ANTHONY ASTORE and JOSEPH SCHWARTZ

Defendants-Appellants

Before:

LUMBARD, Chief Judge,
MADDEN, Judge, U. S. Court of Claims,* and
WATERMAN, Circuit Judge.

Appellants were convicted in the United States District Court for the Southern District of New York of having violated 18 U.S.C. Section 1465. Trial, without a jury, was conducted by Hon. J. Skelly Wright, Judge for the Eastern District of Louisiana, sitting by designation. Upon appeal the conviction of Anthony Astore is affirmed, that of Joseph Schwartz is reversed.

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* Sitting by designation.

Appendix II—Opinion of the United States Court of Appeals

GERALD WALPIN, Asst. United States Attorney for the Southern District of New York (S. Hazard Gillespie, Jr., United States Attorney, and John A. Guzzetta, Asst. United States Attorney, on the brief), for Appellee.

DAVID M. MARKOWITZ, N. Y. C., for Appellant Astore.

OTTO F. FUSCO, Bronx, N. Y., for Appellant Schwartz.

Sam Gold, Moses Shipman and appellants Anthony Astore and Joseph Schwartz were charged in a one-count indictment with having violated 18 U.S.C. Section 1465 by knowingly transporting obscene films from Lodi, New Jersey to New York City on January 20, 1959. Pleas of guilty were entered on behalf of Shipman and Gold, and they later appeared as government witnesses at the two day trial of Astore and Schwartz that resulted in the convictions from which these appeals were taken.

Trial was had before a judge sitting without a jury. F.B.I. agents testified that on January 20, 1959, Schwartz and Shipman were first observed in an automobile entering New Jersey from New York at the toll station of the George Washington Bridge. Shipman was driving. Schwartz was in the rear seat clearing the rear window. It was snowing. Shortly thereafter Shipman stopped at a New Jersey gasoline station and Schwartz moved from the rear seat to the seat alongside the driver. They then proceeded to a parking lot in Lodi where Shipman had a conversation with another man in a second car. Both cars left the lot and the

FBI agents who were following lost sight of them. However, the Shipman car was later seen in New Jersey by other FBI agents, and thereafter was observed returning to New York through the Lincoln Tunnel. It was followed to a camera shop. Shipman, carrying a package, entered the shop, came out empty handed, and he and Schwartz drove off. FBI agents then entered and confiscated the package. It contained 26 reels of obscene films. Later that day the agents arrested Schwartz who vigorously protested his innocence and claimed to them that he was unaware of the contents of the package or of the purpose of Shipman's trip to New Jersey.

Gold's testimony implicated Astore and gave meaning to the activities of Schwartz and Shipman observed by the agents. He testified that Astore and he were partners in the Bergen Film Laboratory, a New Jersey enterprise; that this business was primarily the distribution of obscene films although they also distributed cartoons and religious and educational films; that Astore knew that Shipman had purchased films from Gold on several occasions in 1957 and 1958 and knew that Shipman transported his purchases to New York; that he had introduced Shipman to Astore as "Moe from New York" on one occasion in the same parking lot at Lodi where Gold met Shipman on January 20; that in October 1958, Shipman had failed to appear after planning a film purchase and Gold had discussed this occurrence with Astore; that the arrangements for the January 20, 1959 sale to Shipman were made by Gold over the telephone but as Shipman desired to purchase the films on credit, an

unusual request, Gold had discussed Shipman's credit with Astore and identified Shipman to Astore once more as a purchaser from New York; that Astore assisted in wrapping the film into two packages as Shipman had requested; that Gold took the packages to the Lodi parking lot but the films were not transferred there because Shipman feared he was being followed; that they then drove away and the transfer occurred elsewhere.

Shipman followed Gold on the stand for the Government. He admitted the purchase of the obscene films and his transportation of them from New Jersey to New York. In one important particular his testimony differed from that of Gold—he denied ever having been introduced to Astore. It differed from Gold's testimony in another particular. He stated that the packages of films were transferred at the Lodi parking lot. Also, he absolved Schwartz of any part in the scheme. He testified that Schwartz had no knowledge of the purpose of the trip to New Jersey and that he often took Schwartz, a retired person, along on trips with him just for his company. He explained that as he was driving over the George Washington Bridge fog formed on the inside of his car's rear window and that he had asked Schwartz as a safety precaution to wipe off this fog so that he, the driver, could see through the window to the rear.

An FBI agent testified that Schwartz had been seen with Shipman, in Shipman's car, driving about the Bronx in October 1958, shortly before Shipman, unaccompanied by Schwartz, left for New Jersey on the occasion when the

earlier abortive purchase referred to by Gold was scheduled to have taken place.

Astore testified in his own behalf. He conceded that he was aware of Gold's activities in the production, direction and distribution of obscene movies, but he claimed that he had no part in these activities. He disavowed any technical knowledge of film processing and declared that he was interested in Bergen Film Laboratory only for the purpose of creating a place there for his son. He claimed that when he acquired his interest in the enterprise he was informed by the prior owner that the business was legal and offered a fine opportunity for a young man.

Schwartz, a man 67 years of age, retired, unemployed and in ill health, did not take the stand.

The district judge chose to believe the testimony of Gold. He found that Astore was an informed participating partner in the obscene film business of the Bergen Film Laboratory and that Astore knew the 26 rolls of obscene films seized by the FBI were to be transported from New Jersey to New York. Although he commented that the government case against Schwartz was "thin" he found that Schwartz acted as Shipman's lookout on the January 20 trip. In support of this finding he relied upon the testimony that Schwartz was clearing the rear window of the Shipman car when that car entered New Jersey. He found that Schwartz knew of the contents of the seized package. He supported this finding as a fair inference from the testimony, admitted over objection, that Schwartz stated when arrested that at one time he had been a dealer in obscene

matter—hence the court believed Schwartz could identify the contents of the package from its outward appearance. It is implicit from these findings that the court discredited Shipman's testimony that Schwartz was innocent of the purpose of Shipman's trip and that he disregarded Schwartz's own protestations of innocence upon his arrest. Based upon these findings the judge determined that both defendants were guilty of having aided and abetted in the violation of 18 U.S.C. Section 1465, and were therefore guilty as principals, 18 U.S.C. Section 2.

ASTORE

Appellant Astore attacks the sufficiency of the proof from which the judge found he knew of the prospective interstate transportation, and aided and abetted that transportation. There is no merit to this claim. In United States v. Russo, 284 F. 2d 539 (2 Cir. 1960), we recently affirmed a conviction under 18 U.S.C. Section 1465 where the defendant Russo had supplied obscene films in New Jersey to Connecticut purchasers. Russo's only knowledge that the films were to be transported in interstate commerce was obtained from an introduction to the purchasers as "Bob and Sal from New Haven" and the fact that the pickup car had a Connecticut license plate. In the present case Gold testified that he had introduced Shipman to Astore as "Moe from New York" on one occasion and that Astore knew of Shipman's purchases of obscene films. Shipman denied that he had ever been introduced to Astore. In Russo there was a similar denial. Russo denied that "New Haven" had been mentioned when "Bob and Sal" had been introduced to

him. The determination of the credibility of witnesses is, of course, the province of the trier of the facts. The finding of the trial judge that Gold was the believable witness is buttressed by the fact that where Gold's testimony was inconsistent with Shipman's about the events at the Lodi parking lot it was consistent with the FBI agents' corroborative testimony that the two cars left the Lodi parking lot together and that no transfer of anything from one to the other occurred there. Gold's testimony relative to the prior dealings with Shipman, testimony corroborated by the FBI surveillance of Shipman, was additional evidence tending to show that Astore had knowledge of the character of the films being delivered to Shipman and of Shipman's proposed transportation of them to New York. We find that there was sufficient evidence, sufficiently corroborated, to support a finding that Astore had knowledge of the prospective interstate movement. Moreover, there was ample evidence of the partnership, as testified to by both Gold and Astore, to show that Astore, as well as Gold, supplied the obscene films. See United States v. Russo, supra, at 186. Astore's conviction is affirmed.

SCHWARTZ

The evidence against Schwartz was the testimony that he accompanied Shipman on the round trip of January 20 and that at one point on this trip Schwartz cleared the rear window of foggy vapor. Also, that in October 1958, he drove about the Bronx with Shipman shortly before Shipman, alone, went to New Jersey on an occasion when Gold testified Shipman was to pick up some obscene films; and

further, that, when arrested, he stated to an FBI agent that he had formerly dealt in obscene films and knew that Shipman was a dealer in them. From the evidence the court concluded that Schwartz aided and abetted the interstate transportation of obscene films on January 20, 1959 in violation of 18 U.S.C. Section 1465.

Once the trier of fact has found for the Government, we must view the evidence introduced against the appellant in the most favorable light for the Government, U. S. v. Brown, 236 F. 2d 403 (2 Cir. 1956). Nevertheless, we are of the opinion that the conviction of Schwartz must be reversed.

The evidence against him does not measure up to the proof required for conviction of an accessory under the traditional rule of the Second Circuit laid down by Judge Learned Hand in the case of U. S. v. Peoni, 100 F. 2d 401, at 402 (2 Cir. 1938). The facts proved here do not demonstrate that Schwartz in some sort associated himself with Shipman's venture, that he participated in it as in something that he wished to bring about, and that he sought by his own actions to make Shipman's venture succeed.

We do not find sufficient grounds for justifiable inferences that Schwartz knew the purpose of Shipman's trip or knew that the packages transported from New Jersey to New York contained obscene films. For aught that appears Shipman had only invited an elderly friend to accompany him. Nor is there any evil in the fact that Schwartz cleared the inside of the rear window of mist and when the window was cleared returned to the front seat be-

side the driver. This activity was not coupled with any showing that Schwartz was looking for anything, and is consistent with innocence. Nor was there any testimony that obscene films are packaged in any peculiar manner so that by observation of the outside of the package one can tell whether the films contained therein are obscene. It would seem clear to us that what distinguishes an obscene film from any other film is its content—not its shape or size.

The conviction of Astore is affirmed. The conviction of Schwartz is reversed, and the case remanded to the district court with instructions to dismiss the indictment as to him.

APPENDIX — JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-seventh day of March, one thousand nine hundred and sixty-one.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge
HON. J. WARREN MADDEN,
Judge, Court of Claims,
HON. STERRY R. WATERMAN,
Circuit Judge.

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ANTHONY ASTORE, MOSES SHIPMAN and JOSEPH SCHWARTZ,

Defendants-Appellants

SAM GOLD

Defendant

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is as to the appellant, Anthony Astore, be and it hereby is affirmed.

Further ordered, adjudged and decreed that the judgment of said District Court as to the appellant, Joseph Schwartz, be and it hereby is reversed and that the action be and it hereby is remanded with instructions to dismiss the indictment as to him in accordance with the opinion of this court.

A. Daniel Fusaro
Clerk

A true copy,

A. Daniel Fusaro /s/
Clerk

(Seal)